

Attention:

Hon. Dr Sally Talbot MLC

Hon. Nick Goiran MLC

Hon. Colin de Grussa MLC

Hon. Simon O'Brien MLC

(email: lclc@parliament.wa.gov.au)

26 June 2020

AIHS Western Australian Branch Submission on Part 2 of the WHS Regulations for Western Australia

To Whom It May It May Concern,

The Australian Institute of Health and Safety ('AIHS') is a national member-based organisation that prides itself in the provision of a collective voice for the Australian health and safety profession.

We currently have 520 branch members based in Western Australia who are actively involved in the health and safety profession across a broad range of roles and industries. We are pleased to take the opportunity to provide a considered response to the Western Australian Parliament's request for submissions in relation to Part 2 of the Work Health and Safety Bill 2019 (WA) that is currently under review. The profession in Western Australia has some divergent and collective views towards Part 2 of the proposed model legislation which we would like to share with the Inquiry.

In response to the Terms Of Reference pertaining to this Inquiry, the Western Australian branch of the AIHS recognises and endorses the importance of getting the contents right. However, we support the introduction of the Work Health and Safety Bill 2019 (WA) and oppose it being significantly delayed or discharged in its entirety.

Industrial Manslaughter

The inclusion of two new classes of industrial manslaughter category 1 offences, namely 'criminal' and 'simple' are viewed as a departure from the original Model Work Health and Safety 2011 Act (Cth). As such, we are generally opposed to the inclusion of these provisions. In a recent survey of WHS professionals in Western Australia, 90% of respondents believed that these offences are not aligned to the intent or the overall objectives of the legislation. Further, they believe that the

National Office PO Box 2078, Gladstone Park, VIC 3043

ACN 151 339 329 ABN 82 151 339 329

 03 8336 1995

 natadmin@aihs.org.au

 aihs.org.au

introduction has the potential to damage the way in which workplace health and safety is viewed and managed; especially for small and medium sized businesses.

Leading academics and researchers such as Professor Sidney Dekker (2016) have previously warned against the industrial manslaughter approach as it is likely to inadvertently result in the poor management of risk. Organisations which do not report or manage risk well find that incidents continue to occur; however, they come as a surprise. Conversely, organisations such as high reliability organisations welcome the identification of risk, because risks that are known and understood can be managed. This ultimately leads to improved health and safety outcomes. It is essential that organisations take a proactive approach to managing risk, which we believe is likely to be hindered by the threat of an industrial manslaughter penalty.

Statements from our respondents include the following: (note: not edited):

“I do not support provisions for industrial manslaughter. I honestly believe that the percentage of employers who would intentionally put people in harm's way is quite small. The issue is that small and medium-size enterprises will be the ones who get punished because they will become an easy target and not be able to defend themselves. Compared with large organisations who can in turn engage legal representatives to protect them. Generally, people don't go out to hurt themselves at work from my experience.”

“I do not support the proposed introduction of industrial manslaughter. The ‘crime’ industrial manslaughter charge would require a significant level of individual culpability and evidentiary burden of proof. Similar to the introduction of industrial manslaughter within the Crimes Act of the ACT in 2003, in the majority of cases the State would realistically not be able to be established beyond reasonable doubt. The ‘simple’ charge effectively infringes on the criminal law requirements for the standards of evidence within criminal law proceedings by allowing a weaker case by the Department of Public Prosecutions to be circumvented away from c 30A and proceed under c 30B of the Bill. In addition, the varying imprisonment and financial penalties between both potential charges under Subdivision 2 conveys to the public the dollar value of human life is dependent on the quality of evidence and strength of the case of the prosecution by the State. The insertion of the clauses would appear to be an attempt at a cash grab by the State Government to boost the bottom line of the balance sheet under the guise of improving work health and safety.”

General Increase In Penalties And The Consequences Of Doing So

The Western Australian branch of the AIHS believes that the increase in the penalties for non-compliance is likely to have an inverse effect; turning an organisation's behaviour away from the robust features of a modern safety management system which have been proven to improve health and safety performance. For example, we believe that proactive reporting of incidents and subsequent ‘no-blame’ approach to investigations will potentially be suppressed by this aspect of the legislation.

The Western Australian branch of the AIHS also believes that small and medium sized businesses, particularly those engaged in medium to high risk activities will not be motivated by the threat of prosecution for industrial manslaughter, to proactively improve safety performance. It may appear easier and cheaper to merely ensure incidents are not reported internally or to statutory authorities. Similarly, large organisations may view these penalties as the cost of doing business. Furthermore, these potential consequences might stifle innovation either on an organisational level (developing new products, processes or services) or simply in an organisations' approach to

managing health and safety. These unintended outcomes would be very disappointing for the health and safety profession.

Small and medium sized businesses may also be adversely impacted by this legislation since they may not be able to afford the legal representation required to defend themselves or hold insurance policies to protect business solvency. This may result in organisational or individual behaviours that are detrimental to health and safety outcomes.

It also remains unclear whether the overall strategy for introducing industrial manslaughter and increasing penalties as a deterrent will improve the quality of health and safety in the workplace. Literature would suggest that increasing penalties serves to somewhat satisfy the public perception of justice, rather than decreasing the incidence of poor health and safety outcomes.

Statements from our respondents include the following: (note: not edited):

“If you wish to improve safety outcomes it will be best achieved by education and enrolling, not threat and punishment. People need to be committed to the safety of work not in service of compliance. Manage the risk not the rule.”

“Whilst I acknowledge the intent is to lift the profile of the importance of risk elimination / effective risk reduction to prevent deaths and serious injuries. I am not convinced of the true value of the “big stick” approach. I am also less convinced that the businesses and individuals that are the target won’t get it anyway.”

“Overall while the premise in place to potentially protect lives is sound, I sit more on the no side than the yes. While this does provide some consolation to families of the victims, I think in practice big business will be set up with too many levels of deferred responsibility it would be difficult to prosecute the guilty party. I also think for small business start-up’s while trying to do their best with health and safety, run at a disadvantage.”

Onus On Duty Holders

We asked our participants questions associated with the primary duty of care imposed on a person conducting a business or undertaking (PCBU) and officers. Namely, will these definitions and stated obligations serve to increase the protection of workers? We found that most respondents supported the primary duty of care, but did not fully support the further duties outlined in Division 3 of Part 2.

We also received feedback that the requirements placed on some of the categories, and the intended targets of those categories outlined in Division 3 of Part 2 were somewhat unclear. Respondents requested further clarity or revision around the following classes:

- Services related to work health and safety
- Officers, workers and other persons.

Individuals, Industries Or Organisations Unfairly Impacted

Finally, we asked our respondents whether they perceived the new industrial manslaughter content to unfairly impact some individuals, industries or organisations. We found that most respondents believed that the introduction of industrial manslaughter provisions *would* unfairly impact some individuals, industries or organisations.

Statements from our respondents include the following: (note: not edited):

“I do believe that small and medium sized businesses will be initially disadvantaged. The WA government and its regulator must be proactive in engaging with the major industry groups, educating and supporting the various stakeholders to ensure that practical guidance is provided for an extended period across all industries – especially for small and medium businesses.”

“I think that large and profitable businesses could still be able to get away with negligence, but SMEs may potentially be made examples of as a warning to others that may not be so easily prosecuted. “

“I think life will continue on as normal. There will be more anxiety as to whether organisations are maintaining OSH standards to avoid prosecutions of this kind but it doesn't account for the fact that safety is a journey and you can't have everything perfect 100% of the time. There is always some risk that is accepted as a part of doing business.”

“Smaller organisations in particular may have difficulty.”

“I believe that many small businesses, which make up many businesses across Australia are not fully aware of nor resourced to deliver an effective health and safety program. Whilst I do not believe they should be exempt from the new legislation; I think a lot more effort needs to be applied to improve their understanding and performance in line with legislative obligations. I also believe that some of the high-risk industries such as community organisations (including not-for-profit), farming and fishing are likely to be impacted by the changes. I do not think this is necessarily a bad thing, but I do not believe that generally they are equipped currently to respond to the onus on them. I think they will require proactive support from the Regulator to get up to speed. Additional feedback. In relation to 26A Duty of persons conducting businesses or undertakings that 2 provide services relating to work health and safety. My understanding is that this only relates to individuals providing "services" (ie. consultancy) however, it is silent/unclear in relation to individuals providing in-house WHS services/advice. I believe this section should be revised to clearly articulate who this applies to.”

“Yes, I truly believe that the legislation will severely impact small and medium enterprises that do not have the resources during critical growth stages to develop proactive WHS metrics.”

Thank you for taking the time to review our submission. We would like to reiterate our support for the introduction of the overall model Work Health and Safety Bill 2019 (WA), however we would like further consideration to be given to the industrial manslaughter provisions and overall increase in penalties. We also recommend further clarification be provided around the duties imposed on directors, PCBU's, officers, health and safety services, workers and other persons.

Sincerely,



Ms Celia Antonovsky, AIHS Chair WA Branch

(E: wabranh@aihs.org.au M: 0408925787)

Attachment: Previous submission from the WA Branch AIHS (formerly Safety Institute of Australia) for the Modernising Work Health and Safety Laws in Western Australia dated 31 August 2018.

Modernising Work Health and Safety Laws in Western Australia

Submission by the Safety Institute of Australia, WA Branch

Confidentiality

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31 August 2018

The A/Director General, Safety Regulation
Department Of Mines, Industry Regulation and Safety
WHS Reform
Locked Bag 14
Cloisters Square WA 6850

Dear Acting Director General,

Re: SUBMISSION ON WHS REFORM

The Safety Institute of Australia ('SIA') thank you for the opportunity to submit comments (attached) on the proposed changes to the West Australian Work Health and Safety legislation. Since the announcement of the public comments period the SIA have encouraged members to learn about and discuss the changes at several SIA events and in communications.

The Safety Institute of Australia is the national association for the health and safety profession. Our vision is for safe and healthy workers in productive workplaces, and we pursue this vision by working to build the skills, knowledge and capability of the health and safety profession, and being a voice for that profession. We join with many corporate and strategic partners who share our goals and work with us to achieve them.

Our members are people who work at all levels within Australian companies in a variety of health and safety roles, from those who work at the shop floor level to implement safe and healthy work practices, right through the company to senior executive heads of health safety and environment.

The West Australian Branch has a series of sub committees and groups that do their part to create an annual events program incorporating a state conference as well as training and networking events, write submissions to government on key health and safety policy, and engage in partnerships with organisations that share our vision.

We look forward to learning about the outcome of the public comments period, and developing the State and National safety performance. If we can be of further assistance, please do not hesitate to contact me.

Yours sincerely

Dr Marcus Cattani
Chair Safety Institute of Australia (WA Branch)

#	Recommendation	Clauses	Comments
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c).	We support the recommendation to develop the safety standards of the State, in particular by fostering the constructive cooperation between stakeholders, to improve WHS performance. We recognise that each organisation is different and therefore emphasise that constructive cooperation is critical to the implementation of the Act. The Act includes changes which have the potential for a range of outcomes, from fostering cooperation to antagonising relationships, if not properly managed. We recommend that supporting guidance is provided to raise awareness and the implications of these changes.
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.	3(1).	

#	Recommendation	Clauses	Comments
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	The new legislation presents an opportunity to reflect on the effectiveness of the previous or equivalent roles and design the new roles to address strengths and weaknesses in them. It would be a lost opportunity if the new roles were established without due consideration of the effectiveness of the previous ones, and the association between all roles, to ensure effectiveness. Similarly, the structure of the roles and teams which report to the Chief roles should be developed by consulting with stakeholders. There is an opportunity to design the departments function based on risk of harm rather than a legislative prescriptive approach. There is a need to define the new roles.
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.	
6	Amend the meaning of supply to include the loan of an item.	6(1).	
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	

#	Recommendation	Clauses	Comments
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.	<p>The PCBU duty of care would apply to external providers of WHS advice, service or products and the duties of workers would apply to internally provided WHS advice or service, therefore we question why an additional duty of care is required.</p> <p>The intent of the new duty of care appears to be concerned with the reduction of malpractice of providers of WHS services which we support. As the peak body for OHS professionals in Australia and a signatory to the INSHPO Singapore accord, an international agreement which defines the role, skills and knowledge of various levels of OHS practitioners/professionals. The SIA have established processes to certify OHS practitioners/professionals. The Certification processes require individuals to have appropriate qualifications and experience and commit to continual professional development. Therefore we believe adding a requirement in the Act for providers of WHS Advice to be “Certified” will be more effective at reducing the rates of the illness and injury to Western Australian workers.</p>
9	Amend the meaning of <i>serious injury or illness</i> to include immediate treatment as an in-patient without reference to a hospital.	36(a).	

#	Recommendation	Clauses	Comments
10	Include incapacity to work for 10 or more days as a category of <i>serious injury or illness</i> .	36.	We do not support this recommendation. We support the harmonisation of WHS definitions. In other States general WHS legislation does not include this definition.
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	In general we agree this is a positive recommendation, as an initiative to increase consultation across an organisation or site. We are conscious though that there may be a risk of an organisation with a poor WHS culture to limit the number of HSR's if one person could act across several workgroups, thus reducing the number of HSR's that they need to have trained.
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the <i>regulator</i> to the Work Health and Safety Commission.	72(1)(a).	We agree with this recommendation, with the assumption that the existing standards are maintained or improved.

#	Recommendation	Clauses	Comments
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b).	We support this recommendation. We add that the HSR's should attend a suitable regular refresher training course or event to ensure their knowledge is current..
15	Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.	New clause to be added to section 76.	We support the intent of this recommendation. We suggest that a 'reasonably practicable' clause is added to ensure that Committee meetings continue to be held, to engage and consult with workers, rather than being cancelled because of the unavailability of the "designated" manager. In addition organisations tend to allocate varying levels of authority to the various levels of management, with decisions being escalated as required dependent upon the level of authority required for the decision at hand. Some suggestions initiated in a Committee meeting may be beyond the authority of the manager in attendance, and will need to be escalated, therefore, a "where practicable" clause is required as part of this recommendation.
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84	We support this clause.
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229.	We support this clause.

#	Recommendation	Clauses	Comments
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.	New clause to be added to section 100.	We support this clause.
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.	Whilst the intent is understood, our members have experienced misuse of the right of entry provisions in other states that already have this provision, which have not contribute to the improvement of safety conditions/performance. Members expressed concern about reducing the notification period, and did not support a reduction in the notice period. Union right of entry must require at least 24 hours notification. Members do not support a lower level of penalty for contravening WHS entry permit conditions in WA than the other states that have adopted the model.
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117.	To ensure the proper execution of the right of entry, we support the requirement for the permit holder to inform the Regulator of their intent to enter, to give the Regulator an opportunity to have an Inspector (where available) accompany the EPH.

#	Recommendation	Clauses	Comments
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	Members gave examples of misuse of the right of entry to disrupt an organisation's operations. If the right of entry is to be retained, then we support the authorising authority as being responsible for the revocation of WHS entry permits to act as a deterrent from permit entry holders abusing their entry permit.
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(ii), 133(c)(ii), , 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)	

#	Recommendation	Clauses	Comments
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).	
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivis ion 4 of Division 3 of Part 9 (heading).	We support this recommendation. We suggest that there is a requirement for these requests to be written communications.
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	We support this recommendation.
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	We support this recommendation.

#	Recommendation	Clauses	Comments
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8.	We support this recommendation.
29	For consistency with the <i>Coroner's Act 1996</i> , remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187.	
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	We support this recommendation.

#	Recommendation	Clauses	Comments
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.	We comment that this recommendation has the potential to increase bureaucracy and will inevitably create conflict between PCBUs and Unions and not lead to the productive and trusting relationships that are required between PCBUs and workers to prevent illness and injury and improve safety performance.
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.	274(2)(b).	In principle we support this recommendation. The practical implementation requires planning to ensure the handover to new CoP's, and ensuring the standards set are not lowered in new CoP's.
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1.	We support this recommendation.

#	Recommendation	Clauses	Comments
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC.	We support this recommendation.
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2.	We support this recommendation. We would like to offer a suitable and Certified member of the SIA as a member of this Committee.
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	We support this recommendation.

#	Recommendation	Clauses	Comments
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	We support this recommendation.
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229.	We support this recommendation.
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill.	We support this recommendation.
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .	Equivalent of 51G(3) of the OSH Act.	We support this recommendation.

#	Recommendation	Clauses	Comments
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill.	We support this recommendation.
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	We support this recommendation.